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NOTE AND COMMENT

CONSTITUTIONALITY OF THE LA FOLLETTE AMENDMENT TO THE INTERNAL REVENUE LAW OF 1921.—The United States Senate on November 5, 1921, inserted in the Revenue Act, then before the Senate, a provision that taxpayers in their income tax returns must specify what state and municipal bonds they hold, or else be subject to a penalty of five per cent. That provision was dropped out in conference, but it will come up again, and it is well to look at its constitutionality under the Fourth Amendment to the Constitution prohibiting unreasonable searches.

Doubtless any reasonable requirements in a tax report, so as to show what tax shall be paid, may be enacted by Congress. Thus the supreme court of Connecticut has held (*Underwood Typewriter Co.* v. *Chamberlain*, 94 Conn. 47, affirmed 254 U. S. 113, but not involving this point) that a state in levying an income tax on foreign corporations doing business in the state may require them to file with the state tax authorities a copy of their federal income tax returns.

But that is an entirely different proposition from a requirement that shall give information as to matters not bearing on the tax. Income from state or municipal bonds is not taxable by the federal government, and hence the federal income tax reports have nothing whatsoever to do with income

from state or municipal bonds. The inquiry is not pertinent, and hence the proposed requirement looks like an impertinent prying into private affairs. Constitutional law will not tolerate that. The Supreme Court in the case of *Kilbourn* v. *Thompson,* 103 U. S. 168, said (page 190): "We are sure that no person can be punished for contumacy as a witness before either House, unless his testimony is required in a matter into which that House has jurisdiction to inquire, and we feel equally sure that neither of these bodies possesses the general power of making inquiry into the private affairs of the citizen." Even in an investigation by the United States Senate as to whether any Senators had speculated in stocks, the value of which would be affected by pending legislation, the Supreme Court, while holding that a witness must answer questions (*Re Chapman,* 166 U. S. 661, 667), said that the Act of Congress relative to compelling witnesses to answer "refers to matters within the jurisdiction of the two Houses of Congress, before them for consideration and proper for their action; to questions pertinent thereto; and to facts or papers bearing thereon." The Supreme Court in *Interstate Com. Com.* v. *Brimson,* 154 U. S. 447, 478, approved the *Kilbourn* decision to the effect that "Neither branch of the legislative department, still less any merely administrative body, established by Congress, possesses, or can be invested with, a general power of making inquiry into the private affairs of the citizen." The court also approved the statement of law of Mr. Justice Field in *Re Pacific Railway Commission,* 32 Fed. Rep. 241, 250, that "of all the rights of the citizen, few are of greater importance or more essential to his peace and happiness than the right of personal security, and that involves, not merely protection of his person from assault, but exemption of his private affairs, books, and papers from the inspection and scrutiny of others. Without the enjoyment of this right, all others would lose half their value." In the *Matter of Barnes,* 204 N. Y. 108, where a witness before a legislative committee refused to answer questions in regard to his holdings of stock in a certain corporation, the court pointed out that the New York Code of Civil Procedure provision limited the questions to those which were "pertinent." When the Interstate Commerce Commission asked Mr. Harriman about his purchases of stock, and he refused to answer, the Supreme Court upheld him, and said in regard to the power of investigation claimed by the Commission, "No such unlimited command over the liberty of all citizens ever was given, so far as we know, in constitutional times, to any commission or court." *Harriman* v. *Interstate Com. Com.,* 211 U. S. 407. The latest decision of the Supreme Court as to an individual's private papers is *Gouled* v. *United States,* 255 U. S. 298, decided February 28, 1921. There the court held that the private papers obtained by a government representative from the office of a person under pretense of a friendly call during his absence is an unreasonable search under the Fourth Amendment, and such papers cannot under the Fifth Amendment be used to convict him of a crime. The court further held that a search warrant is proper only to obtain papers to prevent injury to the public from their use and not merely to obtain them as evidence against a defendant. The court said

(page 304): "It has been repeatedly decided that these Amendments should receive a liberal construction, so as to prevent stealthy encroachment upon or 'gradual depreciation' of the rights secured by them, by imperceptible practice of courts or by well-intentioned but mistakenly over-zealous executive officers." The act of a man's wife in allowing government officers to enter his home without a warrant, but on their demand for admission, to make a search for liquor held in violation of the revenue laws, is unconstitutional, under both the Fourth and Fifth Amendments. *Amos* v. *United States,* 255 U. S. 313 (1921). It is true that recently the Supreme Court has held that the government might retain and use books and papers seized by private detectives and turned over to the government as evidence, in a prosecution for fraudulent use of the mails, this not being a search and seizure by the government itself, but two Justices dissented and pointed out that this mode of procedure would not encourage respect for the law and the government. *Burdeau* v. *McDowell,* 41 Sup. Ct. Rep. 574.

Now if the income from state and municipal bonds is constitutionally exempt from federal taxation (as it is), what right has Congress to demand a statement of how much that income is? How is such a statement pertinent to the federal tax? Constitutional law does not sanction inquisitorial invasions of the right to privacy in personal affairs, especially where the information demanded cannot change or aid congressional or executive or judicial action. The inquiry is for some extraneous purpose, apparently curiosity. Even a stockholder cannot examine corporate papers "to gratify idle curiosity." *Guthrie* v. *Harkness,* 199 U. S. 148.

A side light is thrown on this subject by the decisions under the Fifth Amendment that no person "shall be compelled in any criminal case to be a witness against himself." While the limits of search warrants and subpoenas *duces tecum* are not yet clearly defined, yet illegal practices in searches and seizures have been emphatically condemned by the courts of last resort. The search and seizure of a man's private papers to obtain evidence to recover a penalty or forfeit his property or convict him of a crime is unconstitutional. So also is an Act of Congress authorizing United States courts in revenue cases to require the production in court of such private books and papers. *Boyd* v. *United States,* 116 U. S. 616, involving a proceeding *in rem* to forfeit certain goods alleged to have been fraudulently imported without paying duties. The seizure of the letters and correspondence of an accused person in his house during his absence and without his authority by a United States marshal, holding no warrant for his arrest or for the search of his premises, is unconstitutional and the court will order such letters and papers to be returned. *Weeks* v. *United States,* 232 U. S. 383. Furthermore, such books and papers cannot be subpoenaed before a grand jury, nor copies or photographs of them used as evidence against the accused person. *Silverthorne Lumber Co.* v. *United States,* 251 U. S. 385. In New York it is held that a statute which authorizes state officials to enter the place of business of an individual and examine all of his books and papers, to ascertain whether he has attached state stamps on transfers of stock,

violates the constitutional provision that an individual in a criminal case cannot be compelled to be a witness against himself. *People* v. *Reardon*, 197 N. Y. 236.

Cooley on Constitutional Limitations, 5th ed., p. 369, *304, says (note 1):

> "The scope of this work does not call for any discussion of the searches of private premises, and seizures of books and papers, which are made under the authority, or claim of authority, of the revenue laws of the United States. Perhaps, under no other laws are such liberties taken by ministerial officers; and it would be surprising to find oppressive action on their part so often submitted to without legal contest, if the facilities they possess to embarrass, annoy and obstruct the merchant in his business were not borne in mind. The federal decisions, however, go very far to establish the doctrine that, in matters of revenue, the regulations Congress sees fit to establish, however unreasonable they may seem, must prevail."

If Judge Cooley were now alive he would see the law vindicated and its violations rebuked, as shown by the above decisions.

Hence it may well be questioned whether the La Follette amendment would have been constitutional. It was not to get information for legislation, inasmuch as Congress cannot levy an income tax on interest from state or municipal bonds. It has too remote a bearing upon a possible constitutional amendment, especially as the states will not voluntarily by such an amendment increase the rate of interest on their bonds and make the federal government a present of that increase; neither will they vote for such an amendment unless it is reciprocal and allows them to tax the income from federal bonds.

The mere fiat of Congress that such information must be given would, of course, not be conclusive. In the tax case of *Eisner* v. *Macomber*, 252 U. S. 189, the court said (page 206): "Congress cannot by any definition it may adopt conclude the matter, since it cannot by legislation alter the Constitution, from which alone it derives its power to legislate, and within whose limitations alone that power can be lawfully exercised."

EVIDENCE—PROOF REQUIRED TO ADMIT BOOKS OF ACCOUNT.—"Now they [negotiable instruments] are not goods, nor securities, nor documents for debts, nor are so esteemed, but are treated as money, as cash, in the ordinary course and transactions of business, by the general consent of mankind, which gives them the credit and currency of money to all intents and purposes." Lord Mansfield in *Miller* v. *Race*, 1 Burrows 452. By a process something like that by which the negotiability of promissory notes and bills of exchange became recognized in the law of contracts, the rules of evidence seem to be accommodating themselves to the necessities and customs of trade.

"A shop-book was allowed in evidence in indebitatus assumpsit, in a taylor's bill, it being proved that the servant that writ the book was dead, and this was his hand, and he accustomed to make the entries, and no proof was